Ellison Bakery, Inc. *and* Teamsters Local Union No. 414, International Brotherhood of Teamsters, AFL–CIO.[1] Case 25–CA–19313

September 27, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On May 3, 1991,[2] Administrative Law Judge Harold Bernard Jr. issued the attached supplemental decision. The Applicant filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions and to adopt the judge's recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted, and the application of the Applicant, Ellison Bakery, Inc., Fort Wayne, Indiana, for attorney fees and expenses under the Equal Access to Justice Act is denied.

[1] The name of the Charging Party has been changed to reflect the new official name of the International Union.

[2] The decision was incorrectly dated May 3, 1990.

[3] The Applicant urges that the judge could not have considered its May 3, 1991 reply brief since he issued his decision that date. The General Counsel correctly notes, however, that the reply brief was due May 1, 1991, and, therefore, the Applicant's reply brief was untimely filed.

SUPPLEMENTAL DECISION

Equal Access to Justice Act

HAROLD BERNARD JR., Administrative Law Judge. I issued the decision in the underlying case on December 11, 1990, dismissing the complaint in its entirety,[1] and in the absence of exceptions being filed thereto, the Board adopted my findings and conclusions. Respondent in said proceeding here makes application for an award of attorney fees and other expenses pursuant to the Equal Access to Justice Act, Pub. L. 96–481, 94 Stat. 235 and Section 102.143 of the Board's Rules and Regulations, having filed said application on March 8, 1991, contending that substantial justification did not exist for issuing the complaint or for its continuing prosecution, that there was no reasonable basis of law and fact in the General Counsel's position.

By memorandum dated April 10, 1991, counsel for General Counsel filed a position in opposition to this application, denying said allegations and also arguing that any hourly charges in excess of $75 per hour are not reasonable.

As I find, for reasons noted below, that the General Counsel was substantially justified in issuing the complaint and in its continuing prosecution, it is unnecessary to address any fee computation method issue. *Iowa Parcel Service*, 266 NLRB 392, 395 fn. 11 (1983).

The Substantial Justification Issue

A major issue was whether Respondent had terminated 30 employees for engaging in union activities and in order to benefit full-time employees and thereby discourage them from supporting the Union. A central factor in General Counsel's case was that on the very afternoon that union organizers first appeared handbilling plant employees, Respondent terminated the 30 employees as alleged in the complaint together with Respondent advanced reasons deemed *inconclusive* by the General Counsel, and reasonably so, this action raised the not unreasonable view that, together with other reports of Respondent knowledge concerning union activities by employees, the timing for the terminations was suspicious, especially given the large scale of terminations involved and a reasonable view that other options for their timing were not *necessarily* prohibitive for Respondent on the basis of changing company policy based upon admitted dynamics in Respondent's business. Further, a key piece of evidence did not, according to the General Counsel, emerge until late in the hearing, that being the handwritten notes of First Shift Supervisor Glen Osterman tending to show he began calling off a third shift employee before the union handbilling started. Even so the General Counsel could not know at that stage (and certainly not in the precomplaint stage) how his thoroughgoing cross-examination into Respondent's many witnesses on the point had been received by me, or what weight I would be willing to attach to this evidence—which in fact was substantial as it *later* turned out in my analysis. I have no doubt whatsoever that it was not until all the facts had emerged, been expertly marshalled by counsel and the parties' positions analyzed in depth that only then could a reasoned decision be reached on the basis of a myriad of factors, including inferences, credibility resolutions, and legal analysis only made possible by a complete record and the litigation process.

A second issue centered on Respondent's letter to employees dated May 19, 1988, in which could fairly be read a possible threat of plant closure and employee discharge because in it Respondent's president observed that in a unionized setting jobs have been lost and companies closed. In *White Plains Lincoln Mercury*, 288 NLRB 1133 (1988), the Board carefully drew a distinction between an employer's hypothetical observation in a letter of a plant closing if a union made excessive bargaining demands which suggested such action only if the employer were forced into it for reasons outside its control which the Board found lawful, and a second type of letter wherein unionization was equated outright with unprofitability resulting in a plant closure. The second letter was deemed an unlawfully coercive threat in the course of an intense antiunion campaign. The question before me as to which category the Respondent's May 19, 1988 letter to employees fell into clearly involved a close question of fact and law and it cannot be said that the General Counsel was not substantially justified in the choice he made to include this allegation in the complaint.

Suffice it to say that it was not until the decision-making stage that I decided against the General Counsel's remaining allegations of unlawful interrogation and alleged unlawful at-

[1] JD–289–90.

tribution of employee discharge to their union activities by Respondent based upon credibility resolutions guided by the results arising from the crucible of penetrating examination under oath on the witness stand and after consideration of counsels' valuable insights on brief. Prior thereto, the witnesses' testimony during the General Counsel's case in chief stood for what was alleged in the complaint, and supplied the necessary substantial justification.

Under EAJA, an award of attorney fees and other expenses shall be made to a prevailing party unless ''the position of the agency as a party to the proceeding was substantially justified or . . . special circumstances make an award unjust.''[2] Whether or not the Government's action was ''substantially justified'' is accessed in terms of reasonableness. As expressed by Congress and the United States Supreme Court:

> The test of whether or not a government action is substantially justified is essentially one of reasonableness. Where the government can show that its case had a reasonable basis both in law and fact, no award will be made.[3]

While the burden of establishing substantial justification is on the Government, the fact that it lost its case does not give rise to any presumption that it acted unreasonably nor must the General Counsel establish a prima facie case as a prerequisite to finding that its position was reasonable in law and fact.[4]

To these principles it should be added that the General Counsel is entitled to resolve conflicting inferences, and this case presented facts from which many possible and differing inferences could be drawn, in favor of the violation alleged.[5] I find the complaint and its prosecution alike reasonably based in fact and law and substantially justified. Accordingly, I issue the following recommended

ORDER

The application of Ellison Bakery, Inc. for an award under the Equal Access to Justice Act is denied.

[2] EAJA, § 504 (a)(1).

[3] S. Rep. No. 96–253, 96th Cong. 1st Sess. at 6 (1979); H. Rep. No. 96–1418, 96th Cong., 2d Sess. at 10 (1980), and *Pierce v. Underwood*, 487 U.S. 522 (1988).

[4] *Enerhaul, Inc.*, 263 NLRB 890 fn. 3 (1982); *Iowa Parcel Service*, supra.

[5] *Westerman, Inc.*, 266 NLRB 392 (1983), enfd. 749 F.2d 14 (6th Cir. 1984), and *Iowa Parcel Service*, supra.